



State of
North Dakota
Office of the Governor

Jack Dalrymple
Governor

July 28, 2015

BLM Director (210)
Attention: Protest Coordinator
20 M Street SE, Room 2134 LM
Washington, DC 20003

Director Kornze:

I am writing to provide comments on behalf of the State of North Dakota regarding the Proposed North Dakota Greater Sage-Grouse Resource Management Plan Amendment and Final Environmental Impact Statement ("Proposed RMPA") and how it compares to the North Dakota Greater Sage Grouse Management Plan.

Under the Federal Land Policy and Management Act (FLPMA), the nation's public lands must be managed using a multiple-use principle, recognizing the need to balance land use for energy production, providing habitat and forage for fish and wildlife, and various other uses. U.S.C. § 1701(a)(6), (8), (12). The Proposed RMPA does not appear to achieve this balance and must include information on all types of land use. The Proposed RMPA also contains a requirement that BLM separately monitor density of energy and mining when monitoring of all land uses should occur.

Another concern regarding the Proposed RMPA is that it remains unclear whether recent advances in the production process for crude oil and natural gas were taken into account. A portion of the data used in analyzing surface impacts of energy development was collected from well sites that utilize the vertical well-drilling process. Vertical well drilling has a significantly larger foot-print than the horizontal drilling process, which has become prevalent in North Dakota and other states over the past decade. Newer technologies need to be taken into account in the determination of the Proposed RMPA. For example, North Dakota's plan takes into account an advancement in oil development whereby several wells are located on one pad, reducing the overall footprint. To better reflect the true nature of oil development and potential impact, North Dakota's plan is based on well pads per square mile rather than wells per square mile.

The Proposed RMPA must be updated to include current, peer-reviewed studies that provide a scientific basis and rationale for the restrictive measures within greater sage grouse territory. Furthermore, restrictions that are implemented need to take place on a case-by-case basis. The habitat designation currently proposed in the RMPA is also very broad and needs to take into account state-specific mapping data and case-by-case ground-truthing. As an example, the North Dakota plan optimally looks at a distance of 2 miles from an active lek to avoid impacts.

The one-size-fits-all approach applied in the Proposed RMPA ignores the techniques developed and effectively used by the North Dakota Game and Fish Department (ND Game and Fish) to protect sage grouse and their habitat. At the request of Secretary Salazar, ND Game and Fish revised their 2005 state plan to manage sage grouse and to preclude a listing. This plan addressed and incorporated state and local needs and requirements, and utilized the expertise ND Game and Fish has obtained in the field to develop an effective plan. The ND Game and Fish plan identifies various options to mitigate impacts. In addition, the North Dakota plan is the result of collaborative efforts between the state, landowners, industry, and other interested parties. While the North Dakota plan is voluntary, there is consistent communication with industry and other potentially affected interests to reduce impacts to greater sage grouse while allowing multiple-use of the land.

The Proposed RMPA may also have a significant impact on existing oil and gas leases under the proposal. Mineral rights owners could have their existing oil and gas leases modified through unilateral modification of existing contract rights. The changes would impose restrictions on existing leases that would deny or hinder development. A retroactive amendment of lease terms by BLM could be a breach of the lease contract. The information we have received shows that there are currently 61,235 acres of BLM managed acreage within the core sage grouse area in North Dakota already leased for oil and gas in North Dakota with 9,778 not leased and therefore subject to the No Surface Occupancy (NSO) stipulation. A 'one-size-fits-all' approach doesn't assure that negative impacts to the greater sage grouse would not occur. For example, by placing an NSO stipulation on currently unleased mineral acres may actually be detrimental to sage grouse in some areas if the better habitat were on private lands where the well pads and roads would be forced to occur. The North Dakota plan allows for a 'case-by-case' analysis and adapts accordingly.

BLM should revise the Proposed RMPA to remove the requirement that mitigation produce a "net conservation gain". A "net conservation gain" was not addressed in the North Dakota plan and the Proposed RMPA's goal of a "net conservation gain" violates FLPMA. FLPMA does not grant BLM the authority to require that land users offset their impacts to achieve a net conservation gain. Rather, BLM may only condition land uses to avoid "unnecessary or undue degradation" to the public lands 43 U.S.C. § 1732(b). BLM also may create a taking by requiring that oil and gas lessees offset the impacts of their activities to achieve a "net conservation gain. The law is clear that agencies cannot require land users to commit compensatory mitigation unless there is a "nexus" and "rough proportionality" between the required mitigation and the effects of the proposed land use. *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. ___, 133 S. Ct. 2586, 2595 (2013). Requiring holders of federal oil and natural gas leases to provide an express "net conservation gain" may run afoul of the requirement that mitigation have a "rough proportionality" to the impact. The requirement that mitigation must be used to improve baseline conditions is inconsistent with the case law requiring a "nexus" and "rough proportionality" between mitigation and the impacts of a land use.

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Also of concern are the proposed limitations on "tall structures." The definition of these possible structures very vague, leaving it open to interpretation whether structures such as oil and gas production equipment near well pads would qualify as "tall structures." I fear that this could lead to a lot of uncertainty in both the energy industry and other industries.

It is also a concern that the BLM has not afforded the public a meaningful opportunity to comment on the new additions to the Proposed RMPA. There are many significant changes from the previous Draft, and the public should have an opportunity to provide input throughout the process.

Finally, I have been informed by various stakeholders and industries that the BLM did not acknowledge a portion of the public comments, and also did not explain why the comments did not warrant further response. It's important that this process be transparent, and that requires BLM to keep the public informed of proposed changes and to respond to the public's questions and concerns. It is important that BLM provide full responses to questions posed to ensure that all decisions being made in this process are fully informed and transparent to the public.

In order to further address the concerns regarding the review process, I would like to request that the BLM Montana/Dakotas office meet with my office, the North Dakota Game and Fish Department and industry representatives. Please contact Andrea Travnicek, Senior Policy Advisor, at 701-328-2206 to schedule a meeting. We will continue to work with the BLM to develop a plan that not only will help promote the conservation of wildlife needed for sage grouse, but will also allow North Dakota to continue to manage the state's lands and develop its resources in a responsible manner. Thank you for the opportunity to comment on this important issue.

Sincerely,

A handwritten signature in black ink that reads "Jack Dalrymple". The signature is written in a cursive, slightly slanted style.

Jack Dalrymple
Governor

C: Jamie E. Connell, Montana-Dakotas BLM State Director

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